IN THE CIRCUIT COURT OF FREDERICK COUNTY, VIRGINIA.

SALLIE M. RIELY, ETC., *v.* N. W. SOLENBERGER.
SALLIE M. RIELY, ETC., *v.* CORNELL'S ADM'R.

June Term, 1912.

1. Judgments—Right to Assert as Lien on Realty.—The right of the administrator of a judgment creditor to enforce the judgment as a lien upon real estate depends upon whether he still has the right to sue out a scire facias on the judgment.

2. Executions—Right of Administrator to Sue Out.—An administrator of a judgment creditor can not sue out an execution upon a judgment rendered in favor of his intestate until he has been awarded the right upon process of scire facias; and an execution issued without scire facias is voidable if not void.

3. Executions—Void if Issued After Death of Plaintiff Without Revivor.—An execution issued after the death of the judgment plaintiff without revivor of the judgment is absolutely void. It is not a mere technicality to be waived by the execution debtor.

4. Executions—Motion to Quash—Delay in Moving.—While it seems that a motion to quash an execution is addressed to the sound discretion of the court and may be denied after long acquiescence on the ground that the debtor has waived his rights, no question of acquiescence can arise upon a motion to quash an execution issued after death of plaintiff until his personal representative is appointed, because until that time there is no person on whom to serve notice of motion.

5. Executions—Motion to Quash—Motion by Stranger to Record.—Where the rights of a stranger to the record are affected, he may make a motion to quash in the name of a party to the record and the party whose name is thus used will not be permitted to interfere with such use of his name. Thus, where the priority of two judgments against a common debtor depends upon the validity of an execution and the debtor does not move to quash the execution, the court will allow the other judgment creditor to move in the name of the debtor and will not allow the debtor to interfere with this use of his name.

6. Executions—Effect of Quashing Voidable Execution.—After a voidable execution has been quashed, it is as void as if it had been a nullity ab initio.

On demurrer and plea to petition of Cornell's administrator, and on motion to quash an execution.

In May, 1912, John Cornell's administrator filed a petition in

the chancery suit of Riely *v.* Solenberger, setting up a judgment against Solenberger which he claimed was prior and superior in right to the judgment of complainants. The enforceability of Cornell's judgment depended upon an execution issued in the name of Cornell after his death. Complainants in the chancery suit of Riely *v.* Solenberger thereupon moved under § 3599 of the Virginia Code on the law side of the court, to quash the execution, and also demurred to the petition filed by Cornell's administrator and pleaded the statute of limitation to the judgment therein set out.

R. T. Barton and *Carroll G. Walter,* for complainants.
Harry R. Kern, for Cornell's administrator.

OPINION.

THOMAS W. HARRISON, J.: In 1870 John Cornell obtained a judgment against N. W. Solenberger and the last execution issued on said judgment in the lifetime of John Cornell was in March, 1882, on which there was a return of "No Property Found." Cornell died in 1890, and administration on his estate was granted to Harry R. Kern in May, 1912. The judgment has never been revived or an execution awarded in the name of H. R. Kern, Administrator of John Cornell. The right of said Administrator to now assert a lien on the real estate involved in this cause depends upon whether he still has the right to sue out a sci. fa. on said judgment.

An execution issued June 22nd, 1894, but at that time John Cornell was dead and no personal representative of his estate had been appointed. Under Section 3597 of the Code a party obtaining execution may sue out other executions; but I consider that an execution issued not by the authority of the party obtaining it, for he was dead, nor by the authority of any one authorized to represent his estate, must have been without authority either in law or in fact. Nor can there be any question in this state that an Administrator is not entitled to sue out execution until he has been awarded the right upon a process of sci. fa. So that even if there had been an Administrator, the execution issued in 1894 in the name of John Cornell, dead, would have been voidable at least on a motion to quash.

It is true as indicated in Beale *v.* Botetourt Justices, 10 Gratt. 278 that a motion to quash is addressed to the sound discretion of the court and a court after long acquiescence might refuse to quash the execution if it would be inequitable to do so on the ground that the execution debtor had waived his rights.

No such question could arise in this instance, because until the qualification of the personal representative no motion to quash could have been made for there was no one on whom to

serve notice of such motion. The long acquiescence has been on the part of the plaintiff and not on the part of the defendant.

This curious state of facts then appears that an execution was issued by the Clerk without authority from anyone authorized to act in the favor of a dead man whose estate was not represented and with no hand to receive satisfaction in case the execution had been made. Even then, if the issuance of the execution should be treated as voidable, still there has been no delay in making the motion to quash such as would dequire the execution debtor of making such motion and having the execution vacated.

I am familiar with the case of Lowenbach *v.* Kelley, 3 Va. 439, 69 S. E. 352, as I decided the case on the chancery side. In that case the question arose as here, whether the judgment was barred by the statute of limitations. An execution had been issued without authority of law; but I declined in the chancery cause to consider the invalidity of the execution, as I could see no difficulty in the way of a motion to vacate the execution on the law side. I, therefore, stayed the proceedings in the chancery cause until a motion could be made before the Rockingham Court on the common law side to quash the execution. Such a motion was made and the execution was quashed and the Appellate Court affirmed this with full knowledge as the opinion showed of the purpose for which the motion was made. I then dismissed the chancery suit. I cannot, therefore, see the distinction between a void execution and a voidable one, if the court quashes the voidable execution on motion.

After the voidable execution is quashed, it is as void as if it had been a nullity ab initio.

The only question that could possibly arise on the motion to quash is whether or not a stranger to the records can make such a motion. In Wallop *v.* Scarburgh, 5 Gratt. the court holds that a stranger to the records whose rights are affected may do so but must do it in the name of the party to the record. And it also add that a party to the record whose name is thus used would not be permitted to interfere with the use of his name.

The only objection, therefore, that I can see to the motion to quash is that the notice of the motion was given in the name of the lien creditor instead of the name of Noah W. Solenberger; but as this applies only to the notice, there seems to be no good reason why the motion itself should not be made in the name of the execution debtor.

Since the decision in this case, the courts have more and more progressed towards disregarding purely formal matters. At one time the pleading of the statute of limitations itself was regarded as a purely personal defense. In recent years one lien creditor

has been permitted to plead the statute as against another lien creditor in spite of the protest of the parties to the lien. It would be manifestly unjust if this execution of 1894 can simply exist at the wish of N. W. Solenberger that his wish or caprice or desire to give preference to the Cornell judgment should be permitted to defeat the right of the Riely judgment. If N. W. Solenberger makes the motion to quash, the Riely judgment has precedence. If he does not make the motion to quash, the Cornell judgment is given full vitality and, in effect, defeats the Riely judgment.

I take it that the Court will control such a situation. If the Cornell execution should be avoided on the motion of N. W. Solenberger, the Court will not permit him to interfere with the use of his name in making such a motion by Riely judgment.

So that I do not think that there is any necessity of drawing nice distinctions between voidable and void executions.

But, if there is, I am very clearly of the opinion that the execution issued in favor of a dead man when there was no personal representative to authorize it, is absolutely void. It is not a mere technicality, or matter to be waived by the execution debtor. It is not an execution issued at the real instance of a living and existing party, but in the wrong form; but it is an execution issued at the instance of nobody and in favor of nobody, that could not be quashed because there would be no one to proceed against and could not be satisfied because there would be no one to receive the payment. Where an execution is issued after a year, there the only reason for a sci. fa is the presumption of payment, which, if an execution debtor did not desire to rely on, he could waive.

In the case of an execution issued in favor of a dead man where there is in fact a personal representative, some contention might be made, as is made in some of the decided cases, that payment and satisfaction would be made to the personal representative and the fact that the execution issued in the name of the dead man was a mere formal technicality. But I do not observe in any of the cases that the execution is considered voidable only where there is no personal representative and an unauthorized execution is issued in the name of a dead man.

I am clearly of the opinion, therefore, that the judgment in this case of John Cornell is barred. The execution will be quashed, if desired, on the motion of the Riely judgment in the name of N. W. Solenberger, or if not desired the judgment will be held barred on the ground that the execution was not only voidable but void.

Note.

In the foregoing case an execution, issued in the name of the judgment creditor after his death without a revivor of the judgment by

scire facias, was attacked by another judgment creditor of the common debtor both directly by motion to quash under § 3599 of the Virginia Code, and collaterally by plea in a proceeding to enforce the judgment. From the opinion it appears that either mode of attack would have been successful.

The authorities are uniform in holding that an execution issued after the death of the plaintiff in the judgment without a revivor of the judgment is irregular and unauthorized. The only difference of opinion is as to whether the execution is utterly void or only voidable. The weight of authority throughout the country is that such an execution is absolutely void and may be assailed collaterally in any proceeding.

In May *v.* State Bank, 2 Rob. (Va.) 56, 91, it was said:

"We have cases without number deciding that if the plaintiff dies after judgment, there cannot be execution before a scire facias in the name of the representative."

In Beale *v.* Botetourt, 10 Gratt. 278, 282, it was held that an execution issued more than a year after the rendition of the judgment was irregular and voidable though not utterly void, and that such an execution could not be avoided in a collateral suit.

In analogy with this principle some cases have held that an execution issued after the death of the plaintiff is not void but merely voidable (see Day *v.* Sharp, 4 Wharton (Pa.) 339, 34 Am. Dec. 509). The majority of the cases, however, show very clearly that a wide difference exists between an execution issued more than a year after the judgment and an execution issued after the death of the plaintiff, and hold that under the latter circumstances the execution is not simply voidable but utterly void.

In Erwin *v.* Dundas, 4 How. 58, 11 Ed. 875, the validity of an execution issued after the death of the judgment debtor was assailed in an action of ejectment and the execution and all proceedings under it were held absolutely void. The court said:

"This series of cases, coming down from the earliest history of the law on the subject, and the reasons assigned in support of them, necessarily lead to the result—and which has also been confirmed by express decision in all courts where the authority of the common law prevails—that an execution issued and bearing teste after the death of the defendant is irregular and void, and cannot be enforced either against the real or personal property of the defendant, until the judgment is revived against the heirs or devisees in the one case or personal representatives in the other."

Then after referring to the writ of scire facias for the purpose of reviving a judgment, the court said further:

"This writ of scire facias is also made necessary in order to secure the judgment in cases where the plaintiff has neglected to take out execution within the year. And yet it has always been held, that, if taken out after the year, the sale under it is valid, and the title of the purchaser protected. The execution is not void, but voidable, and may be regularly enforced unless set aside on motion.

"In analogy to this course of decision, it has been argued that an execution issued after the death of the party should not be considered void, and the sale under it a nullity, and that the only remedy should be on a motion to set it aside. * * *

"It is apparent that the analogy between this class of cases and the one under consideration is exceedingly remote and feeble, and that they stand upon different and distinct grounds, and the conclusions arrived at upon substantially and distinct considerations."

Again in Ransom *v.* Williams, 2 Wall. 313, 17 L. Ed. 803, the Supreme Court of the United States again held that an execution issued after the death of the judgment debtor is an absolute nullity. In that case the court said:

"By the common law, the death of either party arrested all further proceedings in the case. If the death occurred before judgment the suit abated. If there was but one defendant, and he died after judgment, no execution could issue unless it was tested before the death occurred. In such case it was necessary to revive the judgment by scire facias."

In Dunham *v.* Bentley, 103 Iowa 136, 138, the Supreme Court of Iowa said:

"The judgment plaintiff died before the second execution was issued. No indorsement whatever was made by the clerk, as required by section 3130 of the Code of 1873, and the defendant has entered no complaint of this omission, though, under section 3134, he might have enjoined or moved to quash the execution. The record, then, raises the question whether an execution without indorsement, issued after the death of the judgment plaintiff, is void, or only voidable. A judgment, at common law, became dormant in a year and a day but it might be revived by resort to the scire facias. An execution issued after the lapse of this time, and without so doing, was only voidable. If the defendant chose to interpose no objection to its regularity, others could not do so for him, and he was not permitted to do so collaterally. Freeman, Executions, section 29. Where the time within which the execution has been extended by statute, the same rule is adopted. Mariner *v.* Coon, 16 Wis. 468; Bank *v.* Spencer, 18 N. Y. 134. So, too, where the time within which an execution may issue after a previous one, is limited, an execution issued therefor, without revivor has been adjudged voidable only. Gardner *v.* Ry. Co., 102 Ala. 635 (48 Am. St. 84, 15 South, Ref. 271); Eddy *v.* Coldwell, 23 Or. 163 (37 Am. St. 672, 31 Pac. Rep. 475).

"In analogy with the principle involved in these cases some courts have held an execution issued after the judgment creditor's death, and without revivor, not void, Day *v.* Sharp, 34 Am. Dec. 509; Hughes *v.* Wilkinson, 37 Miss. 482; Darlington *v.* Speakman, 9 Watts & S. 182; Jenness *v.* Lafeer, 42 Mich. 469 (4 N. W. Ref. 220). With better reason such an execution has been adjudged void on two grounds: (1) By the death of the plaintiff, the party to whom authority was given to enforce the judgment is withdrawn; (2) a new party, benefitted and concerned in the judgment, is introduced in the record. Brown *v.* Parker, 15 Ill. 307; Meyer *v.* Mintonye, 106 Ill. 414; Bellinger *v.* Ford, 21 Barb. 311; Morgan *v.* Taylor, 38 N. J. Law 317; Stewart *v.* Nickols, 50 Am. Dec. 127. This last case overrules Day *v.* Sharp, supra. The grounds for holding such an execution void seem unassailable. If the sole plaintiff is dead, the right of another to stand in his stead ought to be first determined, and the record show in whose behalf the benefits accruing under the judgment are taken. This insures the proper application of the amount collected to the satisfaction of the debt. It avoids an unexplained variance in the record. That letters of administration have issued is not presumed, and the authority given plaintiff to resort to the legal processes of compulsory payment ought not to be exercised by another until his rights to do so be fully ascertained. Such a rule serves a double purpose: it guards the rights of the judgment defendant, and protects the property of the deceased plaintiff."

The execution there in question was issued in the name of the plaintiff after his death and it was held void.

In Halsey *v.* Van Vliet, 27 Kan. 474, executions were issued after the defendant's death without a revival of the judgment against the administrator. The judgment was then revived, an execution was issued, and a sale was made. On motion of Halsey, to whom the debtor had previously conveyed the property levied on, this sale was set aside because the executions issued after death but before revivor were void and the execution issued after revivor was not issued within five years after the judgment was entered. Mr. Justice Brewer, delivering the opinion of the court, expressed his personal view that as affecting the question of keeping alive the judgment the executions issued before revivor could not be considered as nullities because he thought the principle upon which the issue of an execution keeps alive a judgment is that the plaintiff thereby affirms its vitality; but he said:

"But my associates are of a different opinion. They hold with the current of authority, that such an execution is an absolute nullity; that under it a sale is absolutely void, passing no title; that it can be challenged in any collateral way, and that being an absolute nullity, it is powerless, not alone for upholding a sale, but also for keeping alive the judgment in behalf of the plaintiff. The hold that where a writ is void, it is void for all purposes, not only as against the defendant, but also as in favor of the plaintiff; that as the plaintiff cannot enforce a sale under it, neither can he thereby continue the judgment alive; and that something more is meant in keeping alive the judgment by the issue of an execution than a mere assertion on the part of the plaintiff that he believes the judgment an existing and valid judgment, and means to collect it, and that there must also be in effort in good faith by the issue of valid process to make a collection, (see the case of Kelly *v.* Vincent, 8 Ohio St. 415) and that when an execution is void, the causing of it to issue cannot be regarded as a proceeding in good faith to collect the judgment. Entertaining these views, the majority of the court hold that the first and second executions were void, and that as the third execution was not issued until more than five years after the date of the judgment, that that execution must also be considered a nullity."

In Ballinger *v.* Redhead, 1 Kan. App. 434, it was held that after the death of one member of a firm no execution could issue on a judgment rendered in favor of the partners, and a sale under such an execution was set aside.

In Seeley *v.* Johnson, 61 Kan. 337, 78 Am. St. Rep. 314, the preceding cases of Halsey *v.* Van Vliet and Ballinger *v.* Redhead, were cited with approval as authorities for the proposition that a sale made under an execution issued after the death of the plaintiff without a revivor of the judgment is void. The court then said:

"The proceedings under the order of sale being void, whether this attack upon them in an action of ejectment was direct or collateral becomes immaterial."

In Vogt *v.* Daily, 70 Neb. 812, executions were issued after death of plaintiff. They were enjoined and a judgment dissolving the injunction was reversed because the court was of opinion that no valid execution could be issued unless the judgment were first revived by the procedure prescribed by the Code in lieu of the writ of scire facias. Seely *v.* Johnson, 61 Kan. 337 was quoted with approval.

In Morgan *v.* Taylor, 38 N. J. Law 317, plaintiff died after judgment and after one execution had been issued and returned unsatis-

fied. The attorney of record then issued an alias execution in ignorance of plaintiff's death and a levy was made. A motion was then made to quash the execution as void. In granting the motion the court said:

"That the execution under which the levy was made is a void writ, seems not to admit of a question. It is, in no way, of importance as affecting the case, that the attorney who caused the writ to be issued, was, at the time of its issue, uninformed of the plaintiff's death.

"The writ was granted to one who, in his lifetime, might rightfully have had execution of his judgment, but, at the time of its issue, was not in being.

"By the common law, all proceedings in a suit at law are stopped by the death of one of the parties. If death happens before judgment, none can be rendered, if after judgment and before execution, no execution can issue. After judgment rendered in the suit, if there were a new person, to be either benefitted or charged by the execution of a judgment, such new person could be made a party thereto, by scire facias only.

"By various acts of Parliament in England * * * the abatement of suit was prevented, and the cause revived and allowed to proceed in the name of the representatives; but where a plaintiff died after final judgment, and before execution, the fruits of the judgment could be saved only by scire facias, to revive it in the name and for the benefit of the new person in interest—the representatives of the deceased plaintiff. Tidd's Practice, title scire facias.

"And such was the law of this state, as applicable to the death of a sole plaintiff after final judgment, at the time of Morgan's death, and when the execution in question was issued. The execution could properly have issued only in the name of the plaintiff's personal representatives, and no other method than proceeding by scire facias would serve to bring them into the writ."

The court further held that it had no power to amend the execution so as to give it any validity.

In Brown v. Parker, 15 Ill. 307, the validity of an execution issued after the death of the plaintiff in the judgment was questioned in an action of ejectment, and the execution and all proceedings under it were held void and assailable collaterally. The court said:

"Was the execution, thus issued, void or voidable? If void, the proceedings upon it were mere nullities, and the purchaser acquired no title; if voidable only, those proceedings cannot be attacked collaterally, but they stand good until set aside or reversed on motion or writ of error. On common law principles, it is clear that the execution and all the proceedings thereon are absolutely void. The death of Pierce arrested all proceedings in the case. There was no longer a party in esse, competent to sue out execution on the judgment, or receive payment and enter satisfaction thereof. The legal interest in the judgment passed to the personal representative of Pierce, in whose name alone payment could be enforced. It was necessary that he should become a party to the record, before any steps could be taken to secure the collection of the judgment. The law prescribed two modes in which that might be done, and it was essential that one of them should be pursued. There is, indeed, some difference of opinion in the United States upon this question. The courts in New Hampshire, Pennsylvania and Mississippi decide that an execution, issued after the death of a defendant, without the judgment being revived against his proper representative, is voidable only, and cannot be impeached collaterally. Butler v. Haynes, 3 New Hamp. 21; Speer v. Sample, 4

Watts 367; Doe *v.* Hamilton, 23 Miss. 496. But the weight of authority is decidedly the other way. It is held in the following cases —and more to the same effect might be cited—that the proceedings upon an execution, sued out after the death of one of the parties, without first reviving the judgment for or against the proper representative, are absolutely void, whether their validity be drawn in question directly or collaterally. Erwin's Lessee *v.* Dundas, 4 How. S. C. 58; Hildreth *v.* Thompson, 16 Mass. 191; Stymets *v.* Brooks, 10 Wend. 207; Lessee of Massie's Heirs *v.* Long, 2 Ham. 287; The State *v.* Pool, 6 Ired., 288; Howard *v.* Rawson, 2 Leigh. 733; Gwin *v.* Latimer, 4 Yerg., 22; Abercrombie *v.* Hall, 6 Ala., 657; Webber *v.* Kenney, 1 A. K. Marshall, 345; The State *v.* Michaels, 8 Blackf. 436. It is true that most of them are cases of the death of the defendant. But there is no difference in principle between the two cases. Judicial proceedings cannot be carried on in the name of a dead man. There is as much necessity for a plaintiff as a defendant. The proceedings in a case are as much arrested by the death of one as the other."

In Meyer *v.* Mintonye, 106 Ill. 414, 420, it was said:

"If, by reason of the judgment being void, or having, from any cause, become incapable of being enforced by execution, as, where some of the parties to it have died, and there has been no subsequent revivor of it, and execution should nevertheless be sued out, as was done in this case, it would confer no authority whatever upon the officer executing it, and a sale made under it, and all official conveyances or other evidences of title founded thereon, would be absolutely null and void. This familiar common law doctrine has long since been fully recognized by this court, and could not now be departed from without endangering the titles to many valuable estates that have doubtless been bought and sold on the faith of it. In short it has become a rule of property, and it is now too late to question it. Pickett *v.* Hartsook, 15 Ill. 279; Brown *v.* Parker, id. 307; Turney *v.* Young, 22 id. 253; Scammon *v.* Swartwout, 35 id. 326; Littler *v.* The People ex rel. 43 id. 194; Borders *v.* Murphy, 78 id. 81; Clingman *v.* Hopkie, id. 152; Mulvey *v.* Carpenter, id. 580. Numerous decisions to the same effect might be cited from other States, but it is not necessary to do so * * * It is clear, therefore, from the above authorities, that by reason of the Meyer judgment not having been revived after his death, the execution issued thereon was unauthorized by law, and that consequently the sale, and the sheriff's deed made under it, conferred upon appellant no title to the premises."

In Bellinger *v.* Ford, 24 Barb. 311, an order for the issue of an execution was made under the New York statute providing that an execution may not issue after five years except by leave of court. The motion for the order was signed "C. B. Wright, atty for plff," but at the time the notice was given and the order made the plaintiff was dead. It was consequently held that the order and the execution were absolutely void, the court saying:

"Mr. Wright had no retainer from the plaintiff in the judgment; consequently no authority to act as her attorney; indeed a deceased person could have no attorney. The notice of motion signed by him had no effect, and must be regarded as unsigned by anyone. It imposed on the defendant no obligation to appear and answer the motion. The order therefore was void, and the execution also, if its validity depended on the order. The execution would not be absolutely void—only voidable—because issued after five years without an order. But it was void unless authorized by the order, for the

reason that the plaintiff in the judgment was dead. Until the suit should be revived—which formerly was done by scire facias, now the same result is attained by motion—no execution could issue. Until then no one had any right to issue it. Besides, the plaintiff being dead, the judgment stood between new parties, who must have a day in court before execution could issue. The execution was therefore absolutely void."

In Jay *v.* Martine, 9 N. Y. Super. Ct. 654, a motion by executors of deceased plaintiffs for an order directing the issue of an execution was denied because the court held that under the Code they should bring an action praying the same relief as was formerly granted in a proceeding by scire facias. The court said:

"Prior to the Code, if a plaintiff or defendant in a judgment died, before execution issued, none could issue until it was revived by scire facias, in favor of, or against the representatives of the decedent. An execution cannot be issued in favor of or against a dead man. It cannot issue in favor of the representatives of a deceased plaintiff, until there is a judgment to authorize and support it.

In Wheeler *v.* Dakin, 12 How. Pr. 536 (1856), the New York Supreme Court held that where a plaintiff dies after judgment there is no party left who can make a motion for leave to issue execution on the judgment and the only remedy is an action by the legal representatives to obtain the relief formerly reached by the writ of scire facias.

In Wingate *v.* Gibson, 5 N. C. 492, an execution issued after plaintiff's death was set aside on motion.

In Stewart *v.* Nuckols, 15 Ala. 225, 50 Am. Dec. 127, it was clearly held that an execution issued after the death of the plaintiff is void. The opinion of the court cites many authorities. See also Collier *v.* Windham, 62 Am. Dec. 767, and Blanks *v.* Rector, 88 Am. Dec. 780.